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Ontario Labour Relations Board HIGHLIGHTS

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Job Postings

The Board has posted ads on the OPS Careers website at: www.gojobs.gov.on.ca

Labour Relations Specialist (1) (Job ID 74081)

Labour Relations Officers (4) (Job ID 74076)

Both competitions close February 23, 2015.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January of this year. These decisions will appear in the January/ February issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Construction Industry Grievance – The union complained that the employer had not provided adequate notice of lay-off to employees, and had not provided the laid-off employees with their pay and records of employment in accordance with the collective agreement – The Board was asked to interpret the terms "when possible" and "if possible" in the provisions relating to the notices and delivery of wages and employment documents – The Board held that the meaning to be applied to the word "possible" in the articles at issue is an elastic one and may, in the circumstances and context of the collective agreement, be given meaning in accordance with relevant business, economic and operational realities – The Board was satisfied that the employer's decision to lay off the employees was spontaneous, so prior notice could not have been given to the union's business manager; because of the timing of the lay-off, it was not possible for the employer to prepare and deliver the records of employment at the time of lay-off, so the employer was entitled to rely on the default procedures – The employer did breach the collective agreement, however, when it failed to pay wages to three of the five employees at the time of the lay-off – Grievance allowed in part: issue of damages remitted to the parties

BLACK & MCDONALD LTD.; RE: International Brotherhood of Electrical Workers, Local 586; OLRB File No: 1752-14-G; Dated: January 28, 2015; Panel: Edward T. McDermott (28 pages)

Certification – Construction Industry – The Board was asked to determine whether the work being performed by two individuals was "construction" or "maintenance" – The individuals were engaged in replacing a section of pipe (called the spool) in the processing of ore to extract gold – The actual work performed was identical to earlier replacements, with one exception: the rubber lined spool was being replaced by one with a ceramic lining – The evidence was clear that the spool itself is a wear part, which must be replaced on an ongoing basis in order to maintain the operation of the system; in the usual course, the replacement of the spool fits squarely within the definition of maintenance work – Was this an "alteration" within the meaning of the Act? – The applicant argued that money is one input into the system, and that by reducing this input the work made the

system more efficient and therefore it "altered" the system – The Board disagreed: inputs into the system included things like raw ore, water, cyanide and electricity, but not money *per se* – The applicant could point to no authority to support the conclusion that the replacement of a wear part with a replacement that operates in precisely the same manner but simply lasts longer and ultimately costs less constitutes an alteration of the system – The work had to be done irrespective of the material used to line the spool and did not alter this primary purpose – Individuals were performing maintenance work; there were no employees at work in the construction industry – Application dismissed

DETOUR GOLD CORPORATION; RE: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; OLRB File No. 0682-14-R; Dated January 12, 2015; Panel: Eli A. Gedalof (14 pages)

Certification – Construction Industry – Practice and Procedure – LIUNA filed a certification application, electing to proceed under section 128.1, and a section 96 complaint a month later – In both the certification and ULP, the union asked for remedial certification, if necessary, under section 11 – In its certification application, LIUNA claimed there were four employees in the unit and that more than 55% of those employees were its members – When the employer filed a response claiming there were 10 employees in the unit, LIUNA challenged all 10 and sought to add three to the list – At the Case Management Hearing the parties agreed that the two files should be heard together, and whether the union could seek relief under section 11 in the proceedings would be dealt with by the panel hearing the merits (the response to the ULP was not due by the time of the CMH) – LIUNA moved to convert the s. 128.1 application so that it could be dealt with under section 8 and said that it did not want a vote, but was seeking the amendment to obtain remedial certification – The Board refused to allow the conversion, holding that the rationale for the request was LIUNA's concern that if a sufficient number of the employees on the employer's list were part of the bargaining unit, its support would fall below 40% – Such a conversion cannot be used for tactical reasons once a union has filed what was in its view a certification application with adequate support – Whether s. 11 remedial certification can be sought in the context of a s. 128.1 application remained an open issue – Matter continues

EBC INC.; RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 1671-14-R & 2063-14-U; Dated January 6, 2015; Panel: Harry Freedman (20 pages)

Intimidation and Coercion – Status – Unfair Labour Practice – The employer sought dismissal of this complaint because the individual who was the target of the employer's alleged contraventions of the Act was an independent contractor, and not an employee – The Board held that while sections 70, 72 and 76 can only be violated with respect to an employee, the word "person" in section 87 is broad enough to afford protection to individuals otherwise exempted from the Act – Motion dismissed; matter continues

ERINDALE PAINTING & DECORATING INC.; RE: The International Union of Painters and Allied Trades, Local Union 1891; OLRB File No. 1100-14-U; Dated January 19, 2015; Panel: Harry Freedman (5 pages)

Bargaining Unit – Colleges Collective Bargaining Act – Employee – Practice and Procedure – George Brown brought an application to exclude an employee, L, from the bargaining unit, invoking the managerial exemption – A Board of Arbitration had already determined L was not excluded from the bargaining unit pursuant to section 5(d) of the Act – However, the Arbitration Board did not consider 5(f), as only the Board has jurisdiction to make a determination under that provision – The union brought an abuse of process motion: the union asserted the Board should adopt the factual findings of the Arbitration Board – The Board held inconsistent findings by the Arbitration Board and the Board based on the same facts would constitute an abuse of process – The Board determined George Brown's ability to call evidence must be limited to facts relevant to the applicability of 5(f) that were not already determined – There was overlap between the facts set out by the Arbitration Board and those advanced before the Board, with significant agreement respecting the relevant facts – The union alleged George Brown exaggerated the scope of L's duties and preferred the description of L's duties set out in the Arbitration Award – The Board determined, as an analysis under section 5(f) necessarily involves different

considerations than under 5(d), George Brown will naturally want to shift its focus – As long as George Brown does not contradict the findings of fact set out in the Arbitration Award it is entitled to approach the relevant facts from a different angle than it did under 5(d) – The union did not point to any specific facts that contradicted the Arbitration Award – Given the factual findings of the Arbitration Board and the parties' agreement on a substantial amount of the facts, and in accordance with Rule 41 of the Board's Rules of Procedure, the Board determined this was an appropriate case to limit the parties' opportunities to present evidence by way of an agreed statement of facts – The Board laid out a draft statement of facts based upon the parties' submissions in order to provide the parties with a starting point and directed the parties to identify the limited areas in which they believe *viva voce* evidence is required – Matter continues

GEORGE BROWN COLLEGE; RE: Ontario Public Service Employees Union, Local 557; OLRB File No. 1644-13-M; Dated: January 9, 2015; Panel: Roslyn McGilvery (26 pages)

Practice and Procedure – Witness – After this grievance was referred to the Board for arbitration, the grievor, with the union's assistance, filed a complaint against the employer with the Human Rights Tribunal of Ontario, claiming discrimination in employment – The employer did not learn of the HRTO matter until after the first day of hearing of the arbitration, in the middle of its witness' examination-in-chief – According to the employer, the basis of the human rights complaint related in large measure to the substance of the grievance – The employer sought permission from the Board to speak to its witness to be able to file a response to the HRTO complaint in which the employer would be asking the Tribunal to defer dealing with the complaint in light of the arbitration already in progress – Permission granted; other issues raised by the employer to be dealt with at the start of the next day of hearing – Matter continues

KONE, INC.; RE: International Union of Elevator Constructors, Local 50; OLRB File No: 24269-14-G; Dated: January 20, 2015; Panel: Owen V. Gray (28 pages)

Representation Vote – Sale of Business – The parties conceded that a sale of business, and intermingling, had occurred – They also agreed to early termination of subsisting collective agreements, with a view to negotiating fresh agreements with the new or merged employers – The only issue for the Board was how to deal with the wishes of the "office staff" in the newly proposed all-employee units – Only two of the seven clerical employees (28%) had previously been unionized – CUPE argued for a vote of the entire bargaining unit; the employers contended that no vote was required, having regard to the disparity in the status of the employees in dispute – The Board held that a vote of only the clerical employees was appropriate: if a vote is to have more than symbolic value, it must, at a minimum, present the potential for its contributing meaningfully to the resolution of the issue between the parties – Vote ordered

LAKELAND POWER DISTRIBUTION LTD.; RE: Canadian Union of Public Employees and its Locals 17-1, 17-04 and 1813; RE: Bracebridge Generation Ltd.; RE: Parry Sound Power Corporation; OLRB File No. 0068-14-R; Dated January 8, 2015; Panel: Derek L. Rogers, Paul LeMay and D. A. Patterson (38 pages)

Certification – Timeliness – Trade Union – LIUNA applied to displace employees in bargaining units represented by the Northern Employees Association, arguing that the Association was no longer a trade union because the individuals purporting to be on its executive were not conducting themselves in accordance with NEA's constitution and in fact were not even aware of the existence of such a constitution – The Board had to determine whether the NEA was a viable organization of employees formed for purposes of collective bargaining (as had been found by the Board some twenty years earlier when the NEA was first certified as a trade union) – Whether the organization abides by its constitution is only one element for the Board's consideration; the Board is more concerned with the NEA and its officers being completely unaware of the constitution's existence and its foundational significance for the NEA as a trade union – Since the purported officers of the NEA had no knowledge of the constitution (by their own admission) nor what was required of them when they were allegedly acting on behalf of the Association, the Board determined they had no ability to ascertain what terms and conditions governed their relationship with NEA's members or the relationship of the members among themselves – The NEA ceased to exist as a trade union at the time the current application for certification was filed with the Board; the agreement between NEA and the employer was not a collective agreement, therefore there was no collective agreement in operation when the applications were filed – Applications timely; matters referred to Case Management Hearing

PICKARD CONSTRUCTION; RE: Labourers' International Union of North America, Local 625; RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 0318-10-U, 3527-10-R, 3657-10-R, 3779-10-R, 4020-10-R & 3599-10-U; Dated January 30, 2015; Panel: Harry Freedman (16 pages)

Certification – Interim Relief – Unfair Labour Practice – UBRFIST sought interim reinstatement and compensation for a number of employees allegedly discharged during a certification campaign – The Board held that determining whether interim relief can address potential irreparable harm required the Board to undertake an exercise of informed prediction – If the employer's adverse actions are ultimately found to have been improper, then the economic losses of the direct victims of those actions can be redressed with monetary compensation, but the other remedies ordered may come too late to reverse damage caused to the union's and other employees' interests – Primeline laid off eight employees, five of whom were key union supporters; a sixth employee, also a union supporter, was among the eight even though he was on a self-imposed extended leave – The union's application for certification was not accompanied by an appearance of support from 40% of the proposed bargaining unit, so there is no prospect of the Board ordering a representation vote before the ULP is fully adjudicated – At that point, a vote will only be possible if the Board concludes that Primeline contravened the Act in such a manner that the union was unable to meet the 40% threshold as of the date of application for certification – Primeline was unable to persuade the Board that its selection of employees for lay-off was unrelated to their exercise of rights under the Act – Orders for interim reinstatement

PRIMELINE WINDOWS AND DOORS INC.; RE: United Brotherhood of Retail, Food & Industrial & Service Trades; OLRB File No. 2848-14-IO; Dated January 26, 2015; Panel: Owen V. Gray (29 pages)

Abandonment – Bargaining Rights – Construction Industry – Sale of a Business – Trade Union – Following the commencement of substantial construction work at the Timmins Square Mall, the Carpenters filed a grievance alleging violations of the collective agreement and an application alleging a sale of business asserting bargaining rights with RioCan at the Mall – RioCan argued the Carpenters abandoned their bargaining rights either (a) prior to the legislative amendments in 1980; or (b) following visible substantial construction work in 2005/2006, during which time the Carpenters did not take action to protect their bargaining rights –The Carpenters had been certified as the bargaining agent for Campeau prior to 1978 – If bargaining rights were not abandoned prior to amendments to the Act in 1980, Campeau would have become bound to the Carpenters province-wide at that time – The Board held it was appropriate for it to examine the union's conduct after the legislative amendments in 1980 to determine whether the Carpenters had abandoned their bargaining rights – The Mall was sold several times over the two decades following 1978 – No remittance of dues or pension contributions were made by Campeau to the Carpenters at any time from 1977 to 1990, none of the collective agreements were renewed, and there was no evidence of other union activity – However, there was no evidence of failure to comply with the collective agreement, such as any construction work by Campeau that would otherwise be performed by members of the Carpenters – An absence of union activity does not establish abandonment when there is no evidence of construction activity – A union is not required to actively pursue its bargaining rights during periods where the employer is not operating in the geographic scope of the collective agreement – The Board found the Carpenters had not abandoned their bargaining rights prior to the legislative amendments in 1980 – When the next major construction work was performed at the Mall in 2005/2006, the work was subcontracted to both union and non-union subcontractors – RioCan argued the Carpenters were aware of the construction work being performed at the Mall and decided not to pursue their bargaining rights – However, the Carpenters clearly raised their objection to the work being performed outside the terms of the collective agreement when they filed a grievance against RioCan – When the Carpenters did not pursue the grievance or file an application claiming a sale of business, this would appear to be abandonment – However, the Board said it must weigh the entire context of the construction activity in 2005/2006: the Carpenters decided not to pursue their grievances because (a) the work was already largely being performed by their members through the sub-contractors; and (b) the Carpenters were pursuing province-wide bargaining rights in an ongoing sale of business application between the parties, involving other properties of RioCan, that would be determinative of the issue – Thus, the Board determined the Carpenters abandoned the grievances, but not their bargaining rights – The Board denied the

Carpenters province-wide bargaining rights in 2010 – When construction work began again in 2013, they filed the present application – The Board found the Carpenters did not abandon bargaining rights by failing to pursue those rights prior to 2013, as there was no construction work being performed – The Board determined a sale of business had occurred within the meaning of the Act pursuant to s. 69, and declared the owners of the Mall bound to the Carpenters ICI Provincial Collective Agreement

RIOCAN REAL ESTATE INVESTMENT TRUST; RE: Carpenters' District Council of Ontario, Local 2486; RE: Laing Property Corporation; RE: Campeau Corporation Limited; RE: Timmins Square Shopping Center Inc.; RE: 1451945 Ontario Limited; OLRB File No. 1346-13-R; Dated January 7, 2015; Panel: Matthew R. Wilson (21 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	Pending
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	Pending
College Employer Council Divisional Court No.397/14	1143-14-CV	Pending
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
EllisDon Corporation Court of Appeal No. C58371 (EllisDon seeking leave to SCC)	0784-05-G	Allowed Board Decision restored November 17/14

Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above